

MENOMINEE TRIBAL ENTERPRISES  
v.  
ACTING DEPUTY COMMISSIONER OF INDIAN AFFAIRS

IBIA 81-18-A

Decided December 22, 1981

Appeal from decision of the Acting Deputy Commissioner of Indian Affairs denying appeal from decision requiring Menominee Tribal Enterprises to obtain Secretarial approval of attorney contracts entered into by the Menominee tribal business organization.

Affirmed in part; remanded with instructions.

1. Indian Lands: Contracts: Formation and Validity: Generally

Menominee Tribal Enterprises, an organization characterized by the 1977 Menominee Constitution to be the principal business arm of the tribe, is an "Indian tribe or tribal council" within the meaning of 25 U.S.C. § 476 (1976) requiring that attorney contracts with Indian tribes must be approved by the Secretary. Since the Secretary approved a transitional scheme for reorganization of the tribal business organization in connection with the restoration of the Federal trust responsibility over the tribe, the Bureau of Indian Affairs is directed on remand to consider whether in this case Secretarial approval has not already been obtained of the attorney contracts which are the subject of this appeal.

APPEARANCES: Joseph F. Preloznik, Esq., and Daniel R. Einum, for appellant, Menominee Tribal Enterprises; Duard R. Barnes, Esq., Office of the Solicitor, U.S. Department of the Interior, for appellee, Bureau of Indian Affairs.

## OPINION BY ADMINISTRATIVE JUDGE ARNESS

Factual and Procedural Background

On January 21, 1977, pursuant to provisions of the Act of December 22, 1973, 87 Stat. 770 (25 U.S.C. §§ 903-903f (1976) (Restoration Act)), a constitution of the Menominee Tribe was approved and Federal trust protection of the tribe was resumed following a 15-year long hiatus in Federal protection which began in 1961 following the Menominee Termination Act of June 17, 1954, 68 Stat. 250 (25 U.S.C. §§ 891-902 (1976)) (Termination Act).

As a result of the Menominee Termination Act, "Federal supervision" over the Menominee Tribe ended in 1961. The Termination Act required closure of the Menominee tribal rolls and development of a termination plan for the future control of tribal property and for the provision of governmental services then furnished by, or under the supervision of, the United States.

On April 29, 1961, the termination plan was published at 26 Federal Register 3726. The termination plan provided for creation of a State corporation to be named Menominee Enterprises, Inc. (MEI). Land previously held in trust for the tribe by the United States, including the tribal sawmill established by the Bureau of Indian Affairs (Bureau) on the Menominee Reservation in 1908, was transferred to MEI. The lands constituting the Menominee Reservation became Menominee County, Wisconsin. The tribal lands and the sawmill business were transferred to MEI as required by the Termination Act. During the termination period, MEI entered into business contracts on behalf of the tribe, including attorney contracts. After resumption of the Federal trust responsibility, the attorneys hired by MEI continued to act on behalf of the tribal business organization, now denominated Menominee Tribal Enterprises (MTE).

On September 11, 1980, following an inquiry by a Menominee tribal member, the Minneapolis Area Director of the Bureau of Indian Affairs determined that any contract between MTE and its attorneys must be in writing and approved by the Secretary of the Interior. The Area Director's opinion was based upon an opinion from the Minneapolis Area Solicitor finding that provisions of existing law codified at 25 U.S.C. §§ 81, 476 (1976) required Departmental approval of attorney contracts entered into by MTE. On January 21, 1981, the Acting Deputy Commissioner of Indian Affairs affirmed the decision of the Area Director.

Issues on Appeal

Appellant raises six issues on appeal, contending that neither 25 U.S.C. § 81 nor 25 U.S.C. § 476 requires Secretarial approval of attorney contracts in the case of MTE. The Bureau concedes on appeal that section 81 has no application in the case of the Menominee Tribe, which is organized pursuant to the Indian Reorganization Act of June 18,

1934 (IRA) (48 Stat. 984, 25 U.S.C. §§ 461-479). <sup>1/</sup> Thus, only two of the six issues raised by appellant are actually in issue before this Board. Remaining for consideration are MTE's contention that it is not an Indian tribe or tribal council for the purposes of the statute and that section 476 of the IRA, above, has no application to the tribal business organ of the Menominee Tribe.

Also before this Board is the Bureau's contention that this matter should be remanded to the Bureau for consideration of the question earlier overlooked by the agency, that is: whether secretarial approval has already been given to the attorney contracts which are the subject of this appeal.

### Discussion and Decision

Two Federal statutes, section 476 of the IRA and the Act of March 3, 1871, 16 Stat. 570, as amended (25 U.S.C. § 81 (1976)) (section 81), require the Secretary of the Interior or his authorized representative to approve attorney contracts with Indian tribes. Section 81 was applicable to all tribal attorney contracts until 1934, when the IRA was enacted. Section 476 of the IRA provides, in pertinent part:

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior \* \* \*.

Those Indian tribes which did not vote against the application of the IRA became subject to its provisions. See 25 U.S.C. § 478. The Menominee Tribe on October 27, 1934, voted for the IRA. See "Ten Years of Tribal Government Under I.R.A." United States Indian Service, 1947, at 20. Section 476 was applicable to the Menominee Tribe from 1934 until April 26, 1961, when the termination proclamation authorized by section 10 of the Act of June 17, 1954, 68 Stat. 250, 252, was published at 26 FR 3726 and made all statutes of the United States which affect Indians because of their status as Indians inapplicable to the Menominee Tribe.

Until the restoration of Federal recognition to the Menominee Tribe by the Restoration Act of December 22, 1973, no contract of the Menominees was subject to approval by the Secretary of the Interior. Under 25 U.S.C. § 903a(a), the provisions of the IRA, including section 476, are made once more to apply to the Menominee Tribe. Consequently, an attorney contract with the Menominee Tribe of Wisconsin is subject to approval under section 476. The applicability of 25 U.S.C. § 476 to the Menominee Tribe is recognized by Article III, section 1 of

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<sup>1/</sup> See 25 CFR 72.1 and 72.7.

its Constitution and Bylaws, where it is acknowledged that the tribal legislature shall be vested with all executive and legislative powers, including "those powers vested in the Tribe by section 16 of the Indian Reorganization Act (48 Stat. 987) [25 U.S.C. § 476] namely, to employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior."

The Department has previously taken the position that, in the case of IRA tribes, section 476 supersedes section 81. Solicitor's Opinion M-36069 (June 22, 1951), 2 Op. Sol. on Indian Affairs 1542 (U.S.D.I. 1979), and see discussion in Atkinson v. Haldane, 569 F.2d 151, 171-172 (Alaska 1977). It is this position that prompts the Bureau to abandon reliance upon section 81 as a basis for the position initially taken by the agency. Since neither party places any reliance upon the earlier statute, its possible application is not considered by the Board.

Appellant contends that section 476 does not apply to attorney contracts with MTE because MTE is not an Indian tribe or tribal council. It is correct that whether section 476 applies to MTE depends upon whether MTE is or is not a part of the Menominee Tribe, since section 476 applies only to attorney contracts with Indian tribes subject to the provisions of the IRA.

Were MTE a corporation or other legal entity, whether established by tribal or state law, having a separate and independent existence from the Menominee Tribe, the Board recognizes that section 476 would have no application to MTE. <sup>2/</sup> However, because MTE is a tribal enterprise, specifically created by Article XII of the tribal constitution and is made a part of the Menominee Tribe as the "principal business arm of the tribe" (Article XII, section 2, Menominee Constitution), the Board holds that section 476 does apply to attorney contracts made by MTE.

Appellant traces the history of Menominee Tribal Enterprises from its beginning as a state corporation known as Menominee Enterprises, Inc., through its transformation under the Menominee Restoration Act

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<sup>2/</sup> Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977), and Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127 (D.C. Alaska 1978), relied upon by appellant, indicate that a tribe incorporated under section 17 (25 U.S.C. § 477) of the IRA can subject itself to suit even though the tribe in its political organization under section 16 (section 476) of the IRA is immune from suit. But in both instances, the section 476 and section 477 organizations are tribal organizations and thus an attorney contract entered into by a section 477 tribal organization is no less a tribal attorney contract than one entered into by a section 476 tribal organization, and the provisions of section 476 apply. Appellant rationalizes that the power to subject the business organization to suit points to a conclusion that the provisions of section 476 can be dispensed with by the Department. There is no cited authority for the position taken, and none can be found.

and the Menominee Tribal Constitution and Bylaws to its present existence as Menominee Tribal Enterprises. Clearly, as a State corporation, Menominee Enterprises, Inc., was not subject to any Federal law for Indians, including section 476. But upon its conversion to a tribal enterprise, subject to the provisions of the Menominee Constitution and Bylaws, it, like the political branch of the Menominee Tribe, became subject to the Federal laws governing Indian tribes and in particular to section 476. The provisions of Article XII of the Menominee Constitution leave no question that MTE is part of the Menominee Tribe.

Quoting from the "Management Plan of Menominee Enterprises, a Tribal Enterprise of the Menominee Indian Tribe of Wisconsin," appellant urges that the following language supports its primary contention that MTE's attorney contract should be free from Federal supervision:

3. Purposes of Tribal Enterprise. The Tribal Enterprise shall be the principal business arm of the Tribe. The Tribal Enterprise is authorized to act on behalf of the Tribe in regard to the business dealings of the Tribe, as set forth in this management plan, and is authorized to act on behalf of the tribe under the name "Menominee Enterprises." The Tribal Enterprise shall manage and operate the subject property in order to conduct the business operations of the Tribe. The primary obligation of the Tribal Enterprise shall be to manage and operate the subject property in a business like manner which will best promote the interest of the Tribe and of the Tribal members.

Notwithstanding appellant's interpretation of the above language, the Board believes the only reasonable conclusion which can be drawn from the above is that Menominee Tribal Enterprises is an integral part of the Menominee Tribe, which is subject to the provisions of section 476.

Section 476 applies to tribal employment of attorneys. Whether the attorney is employed with respect to the business or political affairs or any of the other activities of the tribe appear immaterial so far as the application of section 476 is concerned. The statutory language is clear. Under the Reorganization Act, the MTE is subject to section 476.

It appears, therefore, that the real issue in this controversy is not whether the MTE attorney contract is subject to Secretarial approval, but whether it has, in fact, been given such approval. This appears from the conclusion of appellant's brief where it is urged:

The contracts which Mr. Preloznik had with Menominee Enterprises were valid contracts and were legally binding, and as such are incorporated into the provision of Section 3 of the Management Plan; and, therefore must be honored. The approval by the Secretary of the Interior has been attained

when he approved the Management Plan which provided that all valid and existing contracts would be honored.

Appellant's brief at 29-30.

Since the record on appeal shows that this aspect of the controversy has not been examined by the Bureau, the Board now has no basis upon which it can come to a conclusion with respect to this issue. The Bureau's answering brief states that it would welcome remand of this case for a determination of whether Secretarial approval has already been obtained as "it has no wish to find the appellant has not been in conformance with the law" (Answering Brief at 6).

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed so far as concerns the question whether the MTE attorney contract requires Secretarial approval under section 476. The matter is remanded to the Bureau, however, to determine whether the MTE attorney contract was not approved by the Secretary when he approved the reorganizational plan proposed by the tribe, or under other circumstances. The Bureau's determination of this question may be appealed to the Board by any interested party and, if this occurs, the Board will give the appeal expedited consideration.

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Franklin D. Arness  
Administrative Judge

We concur:

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Wm. Philip Horton  
Chief Administrative Judge

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Jerry Muskrat  
Administrative Judge